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IN RE BABY GIRL CLAUSEN: CAN THE BABY JESSICA NIGHTMARE HAPPEN IN GEORGIA?

INTRODUCTION

It was a case requiring the wisdom of Solomon—a struggle between the birth parents and the prospective adoptive parents for the custody of a two-and-one-half-year-old girl named Jessica DeBoer. The Baby Jessica saga provoked a nationwide debate over the definition of a family, the rights of children, the rights of unwed fathers, and the rights of prospective adoptive parents.¹ The law has traditionally favored the rights of biological parents and the Baby Jessica case is consistent with that tradition.²

Since 1972 the United States Supreme Court has created and delineated the constitutional rights afforded putative fathers,³ who previously had few rights.⁴ In 1977 Georgia and many other states revised their adoption laws in an attempt to expand unwed fathers' rights to include notice of adoption, to recognize an opportunity to be heard, and to comport with the Supreme Court's decision in *Stanley v. Illinois*.⁵ Legislative reform of some adoption laws nationwide

1. See, e.g., Elizabeth Bartholet, *Blood Parents vs. Real Parents*, N.Y. TIMES, July 13, 1993, at A19; Geoffrey Cowley et al., *Who's Looking After the Interests of Children?*, NEWSWEEK, Aug. 16, 1993, at 54; Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 44; Betsy Hart, *A Just Decision? The Long-Running Battle Over a Little Girl*, ATL. CONST., July 12, 1993, at A7; Michele Ingrassia & Karen Springsen, *Standing Up for Fathers*, NEWSWEEK, May 3, 1993, at 52.

2. See generally Bartholet, *supra* note 1.

3. A "putative father" is defined as the "alleged or reputed father of a child born out of wedlock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). The terms "unwed father" and "natural father" are sometimes used in this Note to indicate the same meaning.

4. See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972). See Amy S. Haney, Comment, *The Constitutional Rights of Unwed Fathers in Georgia: In re Baby Girl Eason*, 5 GA. ST. U. L. REV. 591 (1989) and Gregory S. Hilderbran, Comment, *In re Baby Girl Eason: Balancing Three Competing Interests in Third Party Adoptions*, 22 GA. L. REV. 1217 (1988) for good discussions of the development of the constitutional rights afforded unwed fathers.

5. See Haney, *supra* note 4, at 602; see also *Stanley*, 405 U.S. 645 (1972); O.C.G.A. § 19-8-12 (1991). Prior to this revision, a putative father in Georgia was not entitled to notice. See 1977 Ga. Laws 201.

has focused on the rights of the biological parents and often ignores the rights of the potential adoptive parents and of the child.⁶ If society has gained any wisdom from the Baby Jessica saga, it should demand legislative reform of adoption statutes on a nationwide basis in an effort to prevent a repeat of that tragic dilemma.

This Note will explore the implications of the Baby Jessica litigation on adoption law in Georgia. More specifically, this Note addresses the conflict between the rights of putative fathers and the interests of children who have been placed for adoption and suggests reforms intended to minimize this conflict. This Note does not attempt to address the rights of other biological parents who are found in similar situations, the jurisdictional tensions in interstate cases, or any potential structural problems with adoptions themselves.

Part I discusses the progress of the Baby Jessica cases through the Iowa and Michigan courts. Part II examines the development of a putative father's constitutional rights. Part III explores the Iowa law applied in the Baby Jessica case and how Georgia adoption law would be applied in a similar case. Part IV proposes potential avenues for adoption law reform in Georgia with the goal of establishing the best interests of the child as the paramount concern.

I. CASE HISTORY

On February 8, 1991, Cara Clausen gave birth to a baby girl in Iowa.⁷ Clausen, who was not married at the time of the birth, decided to place the baby for adoption.⁸ On February 10, 1991, less than seventy-two hours after the birth, Cara Clausen signed away her parental rights.⁹ On February 14, 1991, Scott Seefeldt, whom Clausen named as the baby's father, relinquished his parental rights.¹⁰ Both

6. Bartholet, *supra* note 1.

7. *DeBoer*, 501 N.W.2d at 194. Cara Clausen was twenty-eight and unmarried when she learned that she was pregnant. Clausen had just ended a relationship with her boyfriend, Dan Schmidt, and began dating Scott Seefeldt. Clausen named Scott Seefeldt as the baby's father on the birth certificate. Gibbs, *supra* note 1. The baby girl is hereafter referred to as Baby Jessica.

8. *DeBoer*, 501 N.W.2d at 194.

9. *Id.* IOWA CODE ANN § 600.3.2 (West 1981) provides: "An adoption petition shall not be filed until a termination of parental rights has been accomplished"

10. *DeBoer*, 501 N.W.2d at 194.

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Clausen and Seefeldt signed waivers of notice to the termination hearing, and the court ordered the termination of their parental rights.¹¹

On the day of the termination hearing, the court awarded temporary custody of the baby girl to Michigan residents Roberta and Jan DeBoer, pending the petition for adoption and the finalization of the order.¹² On February 25, 1991, the DeBoers filed a petition to adopt the baby girl, but the adoption was never finalized.¹³ On March 6, 1991, Cara Clausen had a change of heart and filed a request in Iowa juvenile court to revoke her release of custody.¹⁴ Clausen alleged that she had "good cause" to revoke the release because it was obtained forty hours following the child's birth.¹⁵ Iowa law expressly dictates that a release of custody "[s]hall be signed, not less than seventy-two hours after the birth of the child to be released"¹⁶ Clausen also admitted that she lied about the identity of the biological father, and she named Daniel Schmidt as the real father.¹⁷

On March 12, 1991, Dan Schmidt filed an affidavit of paternity, and on March 27, 1991, he filed a petition to intervene in the adoption proceeding.¹⁸ Thus, less than one month after Jessica's birth, the DeBoers learned of Cara Clausen's claim that the termination of her parental rights was unlawfully procured, yet they still attempted to proceed with the adoption.¹⁹ Nearly two months after Jessica's birth, the DeBoers learned of Dan Schmidt's claim of paternity and

11. *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992).

12. *Id.* Although Cara Clausen received notice, she did not attend the hearing to terminate her parental rights. *DeBoer*, 501 N.W.2d at 194.

13. *DeBoer*, 501 N.W.2d at 194. As a result of a hysterectomy, Roberta DeBoer was unable to have children. She began her attempt to adopt the baby after hearing about Cara Clausen through a friend. Gibbs, *supra* note 1.

14. *DeBoer*, 501 N.W.2d at 194. Clausen moved to set aside the termination of her parental rights alleging that the release was procured by "fraud, coercion, and misrepresentations of material fact." *In re B.G.C.*, 496 N.W.2d at 242; see IOWA CODE ANN. § 600A.4.4 (West Supp. 1994) (stating that a parent who has signed a release of custody may petition the juvenile court to revoke the release before termination of that parent's rights upon a showing of good cause).

15. *In re B.G.C.*, 496 N.W.2d at 243.

16. See IOWA CODE ANN. § 600A.4.2.d (West 1981).

17. *DeBoer*, 501 N.W.2d at 194. Thus, if Daniel Schmidt was in fact the baby's biological father, his parental rights were never terminated. *Id.*

18. *Id.*

19. *Id.*

of his intervention in the adoption proceeding; they then realized that their adoption proceeding could be fatally defective.²⁰ Thus the long legal battle between the Schmidts and the DeBoers began.²¹

The DeBoers, doubting the truth of Clausen's claim that Schmidt was the true father, proceeded with their attempt to adopt Baby Jessica.²² In September of 1991 a paternity test revealed a 99.9% chance that Dan Schmidt was Jessica's father and a 0% chance that Scott Seefeldt was her father.²³

The DeBoers then filed a petition to terminate Schmidt's parental rights in Iowa District Court alleging that he was an unfit parent and had abandoned Jessica.²⁴ On December 27, 1991, the Iowa District Court voided the DeBoers' adoption proceeding after finding that Dan Schmidt was the biological father, his parental rights had not been terminated, and, since abandonment was not established, a "best interests of the child" analysis was not appropriate.²⁵ The district court ordered the DeBoers to return physical custody of Jessica to Dan Schmidt; however, the DeBoers appealed and obtained a stay of the order transferring custody.²⁶ The Iowa Supreme Court agreed to hear the DeBoers' case and to review the lower court's decision reversing the termination of Clausen's parental rights.²⁷

The Iowa Supreme Court ordered that physical custody of Baby Jessica be transferred to Dan Schmidt.²⁸ The DeBoers argued that "the best interests of the child dictate that she

20. *Id.*

21. Cara Clausen married Dan Schmidt in April of 1992. *DeBoer v. Schmidt*, 502 N.W.2d 649, 652 n.6 (Mich. 1993).

22. *DeBoer*, 501 N.W.2d at 194.

23. *Id.*

24. *Id.* The DeBoers argued that Schmidt was an unfit parent because he had two other children by two separate women; he neither supported nor maintained meaningful contact with either child. Gibbs, *supra* note 1.

25. *DeBoer*, 501 N.W.2d at 194; see IOWA CODE ANN. § 600.3(2) (West 1981) (providing that "an adoption petition shall not be filed until a termination of parental rights has been accomplished except" in adoptions of adults and stepchildren).

26. *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992). While Dan Schmidt intervened in the DeBoer's adoption proceeding, the Iowa Court of Appeals reversed the termination of Clausen's parental rights. *Id.* The Iowa Supreme Court granted further review of the decision to reverse the termination of Clausen's parental rights and consolidated it with the DeBoer's appeal in the adoption case. *Id.*

27. *DeBoer*, 501 N.W.2d at 195.

28. *In re B.G.C.*, 496 N.W.2d at 241.

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remain with [them, that] Daniel did not prove his paternity, and [that] he had abandoned [Jessica]."²⁹ The Iowa Supreme Court held that a best interests of the child determination did not govern because Dan Schmidt's parental rights were never terminated.³⁰ Termination of parental rights in Iowa is statutory,³¹ and a statutory ground for termination must be established before the court can apply a best interests of the child analysis.³² In essence, the DeBoers wanted the court to bypass the statutory grounds for termination and grant the adoption simply because it would be in Jessica's best interests. The Iowa Supreme Court held the evidence was insufficient to establish abandonment.³³ The court affirmed the decision granting custody to Dan Schmidt and the decision reversing the termination of Cara Clausen's parental rights.³⁴

29. *Id.* at 245.

30. *Id.*

31. IOWA CODE ANN. § 600A.8-9 (West 1981 & Supp. 1994) (providing the grounds for termination). For example, parental rights will be terminated when a parent has signed a release of custody that has not been revoked, a parent has petitioned for the parent's termination of parental rights, a parent has abandoned the child, a parent has failed to comply with an order to contribute to the child's support, and when a parent does not object to the termination after having been given notice and the opportunity to object. *Id.*

32. *In re B.G.C.*, 496 N.W.2d at 245. The general rule is:

[T]he state cannot interfere with the rights of natural parents simply to better the moral and temporal welfare of the child as against an unoffending parent, and, as a general rule, the court may not consider whether the adoption will be for the welfare and best interests of the child where the parents have not consented to an adoption or the conditions which obviate the necessity of their consent do not exist. However, where a parent by his conduct forfeits the right to withhold consent, but nevertheless contests the adoption, the welfare of the child is the paramount issue.

Id. (quoting 2 C.J.S. *Adoption of Persons* § 66 (1972)).

33. *Id.* at 246. The Iowa Code defines abandonment as the relinquishment or surrendering of parental rights and includes "both the intention to abandon and the acts by which the intention is evidenced." IOWA CODE ANN. § 600A.2.17 (West Supp. 1994). In this case, within ten days of learning he might be the baby's father, Schmidt met with an attorney to determine how to get the child back. *In re B.G.C.*, 496 N.W.2d at 246. Still uncertain whether he was the father, he filed a request to vacate the termination order. *Id.* The Iowa Supreme Court held specifically that "Daniel did everything he could reasonably do to assert his parental rights, beginning even before he actually knew that he was the father." *Id.*

34. 496 N.W.2d at 246-47. In its conclusion, the Iowa Supreme Court stated that it empathized with the following observations of the district court:

The court had an opportunity to observe [the DeBoers] at the time of hearing and the court is under no illusion that this tragic case is other than an unbelievably traumatic event While cognizant of the

One justice took the DeBoers' side, contending that coming down on the side of the biological parents casts a cloud over adoption proceedings.³⁵

The DeBoers decided not to appear at a hearing before the district court where they were ordered to bring Jessica.³⁶ Instead, they filed a petition in a Michigan court pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA)³⁷ and sought to modify the Iowa judgment granting custody of Baby Jessica to Dan Schmidt.³⁸ In a victory for the DeBoers, the

heartache which this decision will ultimately cause, this court is presented with no other option than that dictated by the law in this state. Purely equitable principles cannot be substituted for well-established principles of law.

Id. at 246.

35. *Id.* at 247 (Snell, J., dissenting). The pertinent portions of Justice Snell's dissent are as follows:

The evidence is sufficient to show abandonment of the baby by Daniel

Daniel knew that Cara was pregnant in December of 1990. He saw her in the building where they worked for the same employer Having knowledge of the facts that support the likelihood that he was the biological father, nevertheless, he did nothing to protect his rights. The mother, Cara, who knew better than anyone who the father was, named Scott [Seefeldt] as the father

Daniel's sudden desire to assume parental responsibilities is a late claim to assumed rights that he forfeited by his indifferent conduct to the fate of Cara and her child. The specter of newly named genetic fathers, upsetting adoptions, perhaps years later, is an unconscionable result.

Id.

36. *DeBoer v. Schmidt*, 501 N.W.2d 193, 195 (Mich. Ct. App. 1993).

37. In an attempt to deal with jurisdictional problems in the enforcement of child custody orders, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Child Custody Jurisdiction Act. *DeBoer v. Schmidt*, 502 N.W.2d 649, 654 (Mich. 1993). Every state has enacted the UCCJA in some form. *Id.* For Michigan's version, see MICH. COMP. LAWS ANN. §§ 600.651-673 (West 1981 & Supp. 1994). Most states have enacted the UCCJA as an attempt to "avoid jurisdictional competition between states by establishing uniform rules for deciding when states have jurisdiction to make child custody determinations." *DeBoer v. Schmidt*, 501 N.W.2d 193, 196 (Mich. Ct. App. 1993). The decisions of the Michigan courts are predominantly based on jurisdictional matters pursuant to the UCCJA and the Parental Kidnapping Prevention Act (PKPA) and on whether these acts require a best interests of the child determination in the child's home state. See Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566, 3569 (codified at 28 U.S.C. § 1738A (1988)). This Note does not explore the details of the Michigan cases, the UCCJA, or the PKPA; rather, it focuses primarily on the adoption statutes themselves.

38. *DeBoer*, 501 N.W.2d at 195.

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Washtenaw Circuit Court held that it was in the child's best interests to remain with them.³⁹

Dan Schmidt appealed to the Michigan Court of Appeals, arguing that the Washtenaw Circuit Court lacked jurisdiction to intervene in the Iowa decision.⁴⁰ He further argued that unless the court determined that he was an unfit parent, he had a constitutionally protected right to the custody of his child.⁴¹ Finally, Dan Schmidt argued that the Full Faith and Credit Clause of the United States Constitution required that the Michigan courts recognize and enforce the valid Iowa judgment.⁴²

The Michigan Court of Appeals held that Michigan lacked jurisdiction to hear the case and the DeBoers lacked standing to sue because an Iowa court had terminated their legal right to custody of Jessica.⁴³ The Michigan Supreme Court affirmed the lower court's decision and ordered that Jessica be returned to Dan Schmidt, allowing approximately one month for the actual transfer to take place.⁴⁴ A strong dissent by Justice Charles Levin argued that "[t]he majority's analysis focusing on the contest between the Schmidts and the DeBoers for possession of the child misfocuses on whether biological parents or persons acting as parents have the better 'legal right,' better legal title, not to a carload of hay, but to a child."⁴⁵

39. *Id.* at 196.

40. *Id.*

41. *Id.*; see *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that unwed fathers are constitutionally entitled to a hearing on their fitness as a parent before their children can be removed from their custody).

42. *DeBoer*, 501 N.W.2d at 196; see U.S. CONST. art. IV, § 1.

43. *DeBoer*, 501 N.W.2d at 196-97. The DeBoers argued that a protected liberty interest in the relationship with their child gave them standing to sue. *DeBoer v. Schmidt*, 502 N.W.2d 649, 663 (Mich. 1993). The DeBoers cited the history of cases affording constitutional protection to parental rights. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977); *Stanley*, 405 U.S. 645. From these Supreme Court cases, the DeBoers argued that it was the parent-child relationship that is constitutionally protected and not the mere existence of a biological relationship. *DeBoer*, 502 N.W.2d at 663. The Michigan Supreme Court rejected this argument, holding that a third party does not obtain constitutional rights merely by having custody of the child. *Id.* at 663-64.

44. *DeBoer*, 502 N.W.2d at 668. The court stated that "[w]hile a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit." *Id.* at 652.

45. *Id.* at 670 (Levin, J., dissenting). He further suggested that the Iowa decision

The United States Supreme Court denied the DeBoer's application to stay the decision of the Michigan Supreme Court.⁴⁶ The Supreme Court's decision was a 7-2 vote with Justice Blackmun, joined by Justice O'Connor, dissenting.⁴⁷ Justice Blackmun stated:

While I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk, and with the Supreme Court of New Jersey and the Supreme Court of Michigan in fundamental disagreement over the duty and authority of state courts to consider the best interests of the child when rendering a custody decree.⁴⁸

Justice Levin's dissent in Michigan's Supreme Court decision strongly criticized the majority's analysis and vigorously argued that the child's needs should be considered paramount to prevent serious trauma to a child of such tender years.⁴⁹ Justice Levin stated:

[T]his is not a lawsuit concerning the ownership, the legal title, to a bale of hay. This is not the usual *A v. B* lawsuit

There is a *C*, the child, "a feeling, vulnerable, and [about to be] sorely put upon little human being": Baby Girl Clausen, also known as Jessica DeBoer, who will now be told . . . that she is not Jessie, that the DeBoers are not Mommy and Daddy, that her name is Anna Lee Schmidt, and that the Schmidts, whom she has never met, are Mommy and Daddy.⁵⁰

granting custody of Baby Jessica to Daniel Schmidt cannot be enforced in Michigan without a best interests determination in the child's home state of Michigan. *Id.* at 689.

46. *DeBoer v. DeBoer*, 114 S. Ct. 11 (1993). The thrust of the decision is as follows:

Neither Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. . . . "[C]ourts are not free to take children from parents simply by deciding another home appears more advantageous."

Id. (quoting in part *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992)).

47. *Id.* (Blackmun, J., dissenting).

48. *Id.* at 11-12.

49. *DeBoer v. Schmidt*, 502 N.W.2d 649, 668-69 (Mich. 1993) (Levin, J., dissenting).

50. *Id.* (footnotes omitted) (quoting *Lemley v. Barr*, 343 S.E.2d 101, 104 (W. Va.

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Justice Levin argued that the consequences of adult choices, however disastrous, should not be borne by a two-year-old child, especially when the Parental Kidnapping and Protection Act did not require the result that the majority reached.⁵¹

Justice Levin's dissent focused on the teachings and theories of Professor Homer H. Clark, Jr., author and respected domestic relations expert.⁵² Professor Clark disagrees with the "parental right" theory, which says that a natural parent has the right to custody of his child unless the parent is found to be unfit.⁵³ Professor Clark argues that the rigid parental right theory treats children as though they are property.⁵⁴ Avoiding the rigidities of the parental right doctrine requires "recognition that the child's welfare is the principle guiding the process of decision, but in addition that the emotional and psychological advantages to the child of a parent's care should be placed high in the scale of factors which contribute to that welfare."⁵⁵

Professor Clark maintains that one of the most difficult situations occurs when a parent places the child with prospective adoptive parents and later revokes his or her consent.⁵⁶ He believes that the child's best interests should

1986)).

51. *Id.* at 670-71.

52. *Id.* at 669.

53. *Id.* at 669-70.

54. *Id.* at 670.

55. *Id.* (quoting HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 19.6, at 825 (2d ed. 1988)).

56. *Id.* at 670 n.10. Clark suggests:

[The child should stay] in the custody of the non-parent only where his welfare clearly dictates that result [I]t should not be necessary to prove the parent unfit as a condition of awarding custody to the non-parent. If the child has been in the non-parent's care for a substantial period of time . . . and if the child is strongly attached to the non-parent emotionally and psychologically, so that the child will suffer serious harm by being shifted to another's custody, then the non-parent should be awarded custody. It should not matter for this purpose that delays in the process of litigation account for much of the time during which the child remains with the non-parent, since the effect on the child is the same regardless of the source of the delay. It must be conceded that some of the cases would strongly disagree with an award of custody to the non-parent in these circumstances, absent proof of unfitness, thereby exhibiting a startling lack of concern for the interests of [the] children.

Id. (emphasis omitted) (quoting CLARK, *supra* note 55, § 19.6, at 827).

be the paramount concern in a custody dispute between a natural parent and a third party.⁵⁷

With the aforementioned views and legalities in mind, it is necessary to first review the development of a putative father's constitutional right to develop a relationship with his child before exploring Georgia adoption law and possible avenues for reform.

II. THE PUTATIVE FATHER'S CONSTITUTIONAL RIGHTS

The constitutional rights of unwed fathers have evolved through a series of recent Supreme Court decisions. Prior to a major Supreme Court decision in 1972,⁵⁸ most states only required an unwed mother's consent to an adoption of a child born out of wedlock; consequently, a putative father could not prevent a court from extinguishing his parental rights.⁵⁹ The situations in which the Supreme Court has addressed unwed fathers' rights range from fathers who have assumed responsibility by caring for and supporting their child to fathers who have done nothing to establish a relationship with their child.

A. Stanley v. Illinois

In 1972 the Supreme Court held that a state's presumption that an unwed father is an unfit parent violated the father's constitutional rights.⁶⁰ Although they never married, Peter Stanley and Joan Stanley lived together periodically for eighteen years and had three children.⁶¹ Peter Stanley lost his children when they became wards of the state after Joan Stanley died.⁶² Under Illinois law, an unwed father was not considered a parent.⁶³ Therefore, an unwed father had no opportunity to receive notice and a hearing, or to require the state to prove his unfitness as a parent because the state

57. *Id.* at 670 (citing CLARK, *supra* note 55, § 20.1, at 532-33).

58. *Stanley v. Illinois*, 405 U.S. 645 (1972).

59. Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 316-18 (1984).

60. *Stanley*, 405 U.S. at 647-49.

61. *Id.* at 646.

62. *Id.*

63. *Id.* at 650.

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automatically presumed him to be unfit.⁶⁴ The United States Supreme Court held that the presumption was constitutionally invalid because it denied Stanley equal protection of the laws.⁶⁵ The Court recognized that a putative father who had a considerable amount of involvement in raising and caring for his children deserved constitutional protection and concluded that all parents are entitled to a fitness hearing before the state may take their children away.⁶⁶

B. Quilloin v. Walcott

Six years later, the Court prevented an unwed father from blocking the adoption of his child by the mother's new husband because the father never attempted to legitimate the child or take responsibility as a parent.⁶⁷ Leon Quilloin fathered a child out of wedlock and never married the mother.⁶⁸ Quilloin provided sparse financial support, although he did visit the child "on many occasions."⁶⁹ The mother married and later consented to the adoption of the child by her new husband.⁷⁰ Quilloin attempted to block the adoption, although he did not want custody of the child himself.⁷¹ A Georgia statute required only the consent of the mother for the adoption of a child born out of wedlock.⁷² Over Quilloin's objection and absent a finding he was an unfit parent, the trial court granted the adoption.⁷³ The Georgia Supreme Court affirmed the decision of the trial court.⁷⁴ The United States Supreme Court subsequently affirmed the Georgia decision, stressing that the statute was not unconstitutional when the unwed father has "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision,

64. *Id.*

65. *Id.* at 658. The State of Illinois treated unwed fathers differently from married parents, divorced parents, and unmarried mothers, who were all entitled to a hearing before the state could assume custody of their children. *Id.* at 650.

66. *Id.* at 658.

67. *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

68. *Id.* at 247.

69. *Id.* at 251.

70. *Id.* at 247.

71. *Id.*

72. *Id.* at 248; 1941 Ga. Laws 300, § 3.

73. *Quilloin*, 434 U.S. at 247.

74. *Id.* at 252.

education, protection, or care of the child.”⁷⁵ Thus, a trend began to develop which suggests that an unwed father’s parental rights result from his relationship with his child and not solely from a biological connection.

C. *Caban v. Mohammed*

In *Caban v. Mohammed*,⁷⁶ the Supreme Court found that a New York statute requiring the consent of the mother but not of the father in the adoption of a child born out of wedlock violated the Equal Protection Clause.⁷⁷ Abdiel Caban fathered two children out of wedlock.⁷⁸ Caban supported the children and lived with them until his relationship with their mother ended.⁷⁹ When Caban and the children’s mother separated, the mother took the children and married another man.⁸⁰ Subsequently, the children’s mother and her new husband filed a petition for adoption.⁸¹ Caban and his new wife filed a cross-petition to adopt the children.⁸² Previously, the New York Court of Appeals had held that the statute furthered the interests of illegitimate children, reasoning that “people wishing to adopt a child born out of wedlock would be discouraged if the natural father could prevent the adoption by the mere withholding of his consent.”⁸³ However, the United States Supreme Court held that the statute was an “‘overbroad generalization[]’ in gender-based classifications” and violated the Fourteenth Amendment.⁸⁴

The major distinction between the fathers in *Quilloin* and *Caban* is that Caban displayed an interest in the lives of his children and provided financial support.⁸⁵ The father in *Quilloin* never assumed any significant responsibility for his

75. *Id.* at 256.

76. 441 U.S. 380 (1979).

77. *Id.* at 382, 394.

78. *Id.* at 382.

79. *Id.*

80. *Id.*

81. *Id.* at 383.

82. *Id.*

83. *Id.* at 390 (quoting *Orsini v. Blasi (In re Malpica-Orsini)*, 331 N.E.2d 486 (N.Y. 1975)).

84. *Id.* at 394 (citing *Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Stanton v. Stanton*, 421 U.S. 7 (1975)).

85. Compare *id.* at 382-83 with *Quilloin v. Walcott*, 434 U.S. 246, 251 (1978).

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child.⁸⁶ This distinction explains the Court's different decisions and further solidifies the trend emphasizing the importance of a relationship between the putative father and his child.

D. *Lehr v. Robertson*

In *Lehr v. Robertson*,⁸⁷ the Supreme Court held that a putative father who made no effort to legitimate his child had no standing to contest the adoption of that child.⁸⁸ Jonathan Lehr was the putative father of a child born out of wedlock.⁸⁹ Eight months after the child's birth, the mother married Robertson, who later filed a petition to adopt the child.⁹⁰ Lehr claimed that the adoption order was invalid because he, as the child's natural father, never received advance notice of the proceeding.⁹¹ Lehr did not register with New York's putative father registry; if he had, he would have been entitled to receive notice of the adoption.⁹²

Lehr claimed that a putative father's relationship with a child born out of wedlock is a liberty interest that cannot be destroyed without due process.⁹³ The Supreme Court held that "the mere existence of a biological link does not merit equivalent constitutional protection."⁹⁴ An unwed father must manifest a desire to make a commitment to his child by " 'com[ing] forward to participate in the rearing of his child.' "⁹⁵ New York's legislature passed laws to protect an unwed father's interests in his relationship with his child.⁹⁶ Under these laws, Lehr was not within the class of fathers entitled to notice of the adoption.⁹⁷

86. *Quilloin*, 434 U.S. at 256.

87. 463 U.S. 248 (1983).

88. *Id.* at 261-62. Since this decision, states have attempted to draft statutes that establish specific tests that the putative father must meet to have standing to contest an adoption. See Daniel S. Wilson, Note, *Nebraska's Five-Day Statute of Limitations for Unwed Fathers*, 67 NEB. L. REV. 408 (1988).

89. *Lehr*, 463 U.S. at 250.

90. *Id.*

91. *Id.*

92. *Id.* at 250-51.

93. *Id.* at 255.

94. *Id.* at 261.

95. *Id.* (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

96. *Id.* at 263; see N.Y. DOM. REL. LAW § 111-a (McKinney 1988).

97. *Lehr*, 463 U.S. at 263-65.

Thus, *Lehr* continued the established trend that biological ties alone are not enough for a putative father to secure his constitutional rights and that his rights will rest upon his actual relationship with his child. The Supreme Court decisions demonstrate that a putative father must take some affirmative action to protect his interests by participating in the custody and care of his child. The mere fathering of a child is not enough to entitle a putative father to rights of a constitutional magnitude.

III. IOWA AND GEORGIA ADOPTION LAWS

A. Iowa Law

In Iowa, prospective adoptive parents cannot file an adoption petition unless and until the biological parents' rights are terminated in accordance with Iowa statutory law.⁹⁸ A copy of an order terminating parental rights must be attached to the adoption petition.⁹⁹

A release of custody may take place prior to the termination of parental rights. The Iowa code provides that a release of custody of a minor child must be in writing and signed by the living parents not less than seventy-two hours after birth, and a petition for termination of the parental rights must follow within a reasonable time.¹⁰⁰ The signature of only one living parent who has possession of the child is required to enable either an agency or a person making an independent placement to take custody of the child; however, the agency or the person facilitating an independent placement must immediately petition the court to be appointed custodian and for the termination of parental rights.¹⁰¹

A release of custody is revocable under certain conditions by either the parent who signed the release or the nonsigning parent.¹⁰² If a signing parent requests a revocation, the court must grant the revocation within ninety-six hours following

98. IOWA CODE ANN. § 600.3 (West 1981); *id.* § 600A.3 (providing that "termination of parental rights shall be accomplished only according to the provisions of this chapter").

99. *Id.* § 600.6.

100. *Id.* § 600A.4.2.

101. *Id.* § 600A.4.3.

102. *Id.* § 600A.4.4 (West Supp. 1994).

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the signing of the release, the court must grant the revocation.¹⁰³ If a nonsigning parent requests a revocation or if a signing parent requests it after the ninety-six hour time limit, the court may grant revocation only upon "clear and convincing evidence that good cause exists."¹⁰⁴ The Iowa legislature amended the statute in 1992 to require the juvenile court to "give paramount consideration to the best interests of the child" in deciding whether good cause exists to revoke a release of custody.¹⁰⁵

A petition for the termination of parental rights may be brought by a parent, prospective parent, custodian, or guardian of the child.¹⁰⁶ The Iowa Code sets out the specific grounds for the termination of parental rights.¹⁰⁷ These grounds include when: the parent has signed a release of custody; the parent has abandoned the child; the parent has failed to comply with an order to financially support the child; or the parent does not object to the termination.¹⁰⁸

Notice of the termination proceeding must be served on all "necessary parties," and these parties must be heard by the juvenile court before termination can occur.¹⁰⁹ Under Iowa law, the term "necessary party" would include the living father and mother of the child.¹¹⁰ The juvenile court will appoint a guardian ad litem if the child has no guardian or if the interests of the guardian and the child conflict.¹¹¹ When, as is the case with many putative fathers, a necessary party's location or identity is unknown, "every reasonable effort" must

103. *Id.*

104. *Id.* The revocation statute was involved in Cara Schmidt's situation. See *In re B.G.C.*, 496 N.W.2d 239, 242 (Iowa 1992). She claimed that "good cause" to revoke her release of custody existed because she signed her release in less than the required seventy-two hour waiting period and because the attorney for the DeBoers allegedly procured it by fraud, coercion, or misrepresentation. *Id.*

105. IOWA CODE ANN. § 600A.4.4 (West Supp. 1994). Included in the best interests of the child determination is a policy for the "avoidance of a disruption of an existing relationship between a parent and child." *Id.*

106. *Id.* § 600A.5.1 (West 1981).

107. *Id.* § 600A.8.

108. *Id.*

109. *Id.* § 600A.6. "Necessary parties" is defined in the Iowa Code as living parents, guardians, custodians, guardians ad litem, petitioners, or persons standing in the place of the parents of the child. *Id.* §§ 600A.5.3.a-b, 600A.6.

110. *Id.* § 600A.5.3.b(1).

111. *Id.* § 600A.6.2.

be made to identify, locate, and notify this party.¹¹² The juvenile court then has the authority to dispense with notice to a necessary party who cannot reasonably be located.¹¹³ Thus, under Iowa law, a putative father would be deemed a necessary party and would be entitled to notice if, after reasonable efforts, he could be located. If he cannot be located, the court will terminate his rights.¹¹⁴

B. Georgia Law

Prior to 1977, unwed fathers in Georgia could not consent to or block an adoption petition.¹¹⁵ However, the Georgia General Assembly amended the adoption statutes in 1977 after the Supreme Court decision in *Stanley v. Illinois*, which held that a state's presumption that an unwed father is an unfit parent violated the father's constitutional rights.¹¹⁶ The General Assembly completely revised Georgia's adoption statutes again in 1990.¹¹⁷

Under the current statutory scheme, a living parent or guardian of a minor child who is about to be adopted by a third party must voluntarily and in writing surrender all rights to the child to the third party.¹¹⁸ A parent may withdraw the surrender within ten days following the signing away of parental rights.¹¹⁹ Under certain situations, a termination of parental rights is not required as a prerequisite to an adoption petition.¹²⁰ Within sixty days following the surrender date, a petition for adoption must be

112. *Id.* § 600A.6.6.

113. *Id.*

114. *Id.* § 600A.8.6. While Daniel Schmidt was definitely a necessary party as defined by the statute, his identity was concealed by Cara Clausen when she lied about the identity of the father on the birth certificate. Thus, Daniel Schmidt never received notice of the termination hearing. *See In re B.G.C.* 496 N.W.2d 239, 246 (Iowa 1992).

115. *Quilloin v. Walcott*, 434 U.S. 246, 248 (1978); 1941 Ga. Laws 300, § 3.

116. *Stanley v. Illinois*, 405 U.S. 645, 647-49 (1972); *see* 1977 Ga. Laws 201.

117. *See* 1990 Ga. Laws 1572.

118. O.C.G.A. § 19-8-5 (1991).

119. *Id.* § 19-8-9(b).

120. *Id.* § 19-8-10. For example, no termination is required when the child is abandoned, when the parent cannot be found after diligent search, or when the parent is insane. *Id.*

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filed or the child will be placed for adoption by the Georgia Department of Human Resources.¹²¹

Georgia law provides that if the child's biological father is not known or cannot be found, the adoption petitioner may file a petition to terminate the father's rights.¹²² Within thirty days from the filing of the termination petition, the court shall conduct a hearing in chambers to determine if the petition should be granted.¹²³ The court will examine factors such as the father's participation and contribution to the child's support.¹²⁴ If the father assumed none of the enumerated responsibilities, then the court will terminate his rights.¹²⁵

If the father performed any one of the enumerated acts, the court will determine whether he established a "familial bond" with the child.¹²⁶ If the court finds that no familial bond existed, it will terminate the father's rights.¹²⁷ However, if a familial bond does exist, the biological father is entitled to receive notice of adoption proceedings.¹²⁸ The father then has thirty days in which to file a petition to legitimate his child and give notice of this petition to the appropriate parties.¹²⁹ If the biological father chooses not to legitimate his child within the thirty-day period, the court will terminate his rights.¹³⁰ If the father legitimates the child, the adoption process comes to a halt.¹³¹

At the adoption hearing, the court will determine if all parental rights have been terminated.¹³² If so, the court will determine if the adoption is in the best interests of the

121. *Id.* § 19-8-5(k).

122. *Id.* § 19-8-12(b).

123. *Id.* § 19-8-12(b)(3).

124. *Id.* § 19-8-12(b)(3)(A). Specifically, the statute says the court must look to see if the father lived with the child, contributed to the child's support, made an attempt to legitimate the child, or provided support for the mother during pregnancy. *Id.*

125. *Id.*

126. *Id.* § 19-8-12(b)(3)(B).

127. *Id.* § 19-8-12(b)(3)(B)(i).

128. *See id.* § 19-8-12(b)(3)(B)(ii)(II).

129. *Id.* § 19-8-12(c).

130. *Id.* § 19-8-12(d).

131. *Id.* § 19-8-12(e).

132. *Id.* § 19-8-18(b).

child.¹³³ If in the child's best interest, the court will then enter a decree of adoption.¹³⁴

During the 1995 legislative session, the Georgia General Assembly passed an Act amending Code section 19-8-18 by adding two additional subsections.¹³⁵ The Act reads as follows:

- (e) A decree of adoption issued pursuant to subsection (b) of this Code section shall not be subject to any judicial challenge filed more than six months after the date of entry of such decree.
- (f) Any decree of adoption issued prior to the effective date of this action shall not be subject to any judicial challenge more than six months after the effective date of this Act.¹³⁶

The Act was specifically introduced and passed in response to the many cases nationwide in which adoptions have been thwarted by the eleventh hour appearance of a biological parent, as happened in Baby Jessica's case.¹³⁷ This Act is intended to serve as a "gate closing" that will provide a legal and emotional shield for the newly formed adoptive family.¹³⁸

C. Would Georgia Courts Have Reached the Same Result?

*In re Ashmore*¹³⁹ concerns an unwed mother who surrendered parental rights to her child two days following the child's birth.¹⁴⁰ The child's father refused to surrender his rights and filed a petition to legitimate.¹⁴¹ In deciding the father's rights, the Georgia Court of Appeals held that the best interests of the child standard mandated that the child be adopted rather than allowing the putative father to obtain custody.¹⁴² The court agreed with the trial court's conclusion that "harm would come to this child by granting [the

133. *Id.*

134. *Id.*

135. 1995 Ga. Laws 791.

136. *Id.*

137. Telephone Interview with Senator Sonny Perdue, Senate District No. 18 (Apr. 14, 1995) [hereinafter Perdue Interview].

138. *Id.*

139. 293 S.E.2d 457 (Ga. Ct. App. 1982).

140. *Id.* at 458.

141. *Id.*

142. *Id.* at 460-61.

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putative father's] request and thereby disrupting the child's stable family unit greatly and such exceeds any benefits which might flow to the child and will greatly outweigh [sic] any harm which will come to the biological Father.'"¹⁴³ Thus, the court, in order to preserve the child's best interests, did not consider the putative father's rights to be the paramount concern.

Five years later the Georgia Supreme Court reversed the court of appeals position and held that "because Georgia law affords an unwed mother a fitness test or veto power . . . it must also afford [the putative father] a fitness test . . . provided he has not abandoned his opportunity interest."¹⁴⁴ *In re Baby Girl Eason* involved a putative father who moved out of state prior to his child's birth.¹⁴⁵ The mother and father had no further communication.¹⁴⁶ The biological mother placed the child for adoption and surrendered custody to an agency.¹⁴⁷ John and Jane Doe then filed a petition to adopt the child.¹⁴⁸ The putative father received notice and soon thereafter petitioned the court to legitimate.¹⁴⁹ The court noted:

There are competing interests of overwhelming value at stake in the outcome of this case. A biological father may have ties to the child which demand careful analysis in giving them legal effect. The adopting parents who have developed strong emotional connections through their custody of the child, beginning very soon after birth, have interests they likely value beyond measure. The child's future well-being is at risk.¹⁵⁰

The court concluded that the mere existence of a biological link does not afford constitutional protection.¹⁵¹ Unwed fathers gain from their blood ties with their children only "an opportunity interest to develop a relationship with their

143. *Id.* at 460 (quoting the trial court's order).

144. *In re Baby Girl Eason*, 358 S.E.2d 459, 463 (Ga. 1987) (emphasis omitted).

145. *Id.* at 460.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 462.

children which is constitutionally protected."¹⁵² However, that opportunity interest is not "indestructible."¹⁵³ A father must exercise his opportunity interest in a timely manner in order to preserve it.¹⁵⁴

In *Eason*, the putative father was in a situation similar to that of Dan Schmidt because the child had been in the custody of the prospective adoptive parents since shortly after its birth.¹⁵⁵ Therefore, the case was really a custody dispute between the prospective adoptive parents, who had developed emotional attachments to the child, and the putative father, who wanted the chance to develop a relationship with his child. The adoptive parents wanted the court to apply a best interests of the child test to determine the father's rights, while the father wanted the court to use a "parental fitness" test.¹⁵⁶ The court concluded:

Only the state can alter its action to prevent the development of a parent-child relationship with adopting parents until the unwed father's rights are resolved. Thus we conclude if [the father] has not abandoned his opportunity interest, the standard which must be used to determine his right to legitimate the child is his fitness as a parent to have custody of the child. If he is fit he must prevail.¹⁵⁷

If the Baby Jessica situation had occurred in Georgia in 1982, *Ashmore* indicates that the court would have allowed Jessica to stay with the DeBoers simply because of the emotional, physical, and psychological ties that had developed.¹⁵⁸ However, in 1990 the General Assembly revised the Georgia adoption laws and, in so doing, codified the result in *Eason*.¹⁵⁹ Thus, following the 1990 amendments to the adoption statutes, a Georgia trial court would first determine if Dan Schmidt had abandoned his opportunity interest to

152. *Id.*

153. *Id.*

154. *Id.*

155. *See id.*

156. *See id.* at 463.

157. *Id.* The case was remanded to decide whether the putative father had abandoned his opportunity interest, and if he had not, whether he was a fit person for custody. *Id.*

158. *See In re Ashmore*, 293 S.E.2d 457 (Ga. Ct. App. 1982).

159. *See* 1990 Ga. Laws 1572, § 3.

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develop a relationship with Jessica.¹⁶⁰ Since Schmidt never knew of Jessica's existence until after her birth, the court would probably find that he had not lost his opportunity interest. The court would then look to see if Schmidt was a fit person for custody and would, in all likelihood, have come to the same decision as the Iowa courts—that he was fit.¹⁶¹

IV. RECOMMENDATIONS FOR REFORM

The decision in the Baby Jessica case caused a storm of controversy.¹⁶² Many favored the DeBoers because of the emotional ties and bonds of love the couple had established with Jessica.¹⁶³ Some faulted the DeBoers for holding on to a child whom they knew they could probably never adopt.¹⁶⁴ Others blamed Clausen for lying about the identity of the father.¹⁶⁵ However, both sides agreed that "the child has suffered needlessly. Her experience shows how vulnerable our custody laws can leave children, and it has fueled the search for better ways to manage adoption."¹⁶⁶

The National Council for Adoption estimates that unwed fathers contest fewer than one percent of adoption cases.¹⁶⁷ However, reform is needed to specifically address the rights and responsibilities of unwed fathers and to provide for the contingencies that so often occur in dealing with those rights.

The Georgia General Assembly's 1995 amendments to Code section 19-8-18 would not have affected Baby Jessica's case.¹⁶⁸ Dan Schmidt intervened in the DeBoer's adoption proceeding within two months after Jessica's birth and before an adoption decree had been entered.¹⁶⁹ Thus, while the amendments are commendable, they leave open a considerable window for challenges by biological parents. Indeed, the six

160. See *supra* notes 122-34 and accompanying text.

161. *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992).

162. See Cowley, *supra* note 1. According to a CNN Poll, about eight percent of the people who responded believed that Baby Jessica belonged with her biological parents, the Schmidts. *Id.*

163. See *id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. See Ingrassia & Springsen, *supra* note 1.

168. See 1995 Ga. Laws 791.

169. *DeBoer v. Schmidt*, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993).

month statute of limitations was arbitrarily selected.¹⁷⁰ The General Assembly should consider taking additional steps toward adoption law reform to completely commit this state to the preservation of the child's best interests.

A. Putative Father Registries

In an effort to prevent unwed fathers from showing up long after their child's birth and asserting their rights, some states require putative fathers to take responsibility to preserve their rights.¹⁷¹ For example, in Nebraska, a putative father must file a notice of intent to claim paternity within five days following the child's birth to receive notice of an adoption proceeding.¹⁷² If the putative father does not file notice within five days, the state only requires the unwed mother's consent for an adoption, and the state terminates the father's parental rights.¹⁷³

In New York, a man who thinks he may have impregnated a woman must file notice with the "putative father registry" in order to assert his claim to paternity of a child born out of wedlock.¹⁷⁴ A putative father who files notice with the registry effectively preserves his right to receive notice of any proceeding to adopt the child.¹⁷⁵ Before a court enters an adoption order, the court must have the putative father registry searched for a possible father's name.¹⁷⁶ New York also allows notice to a few other specific classes of unwed fathers.¹⁷⁷ As the following case illustrates, the registry

170. Perdue Interview, *supra* note 137.

171. See, e.g., ARK. CODE ANN. § 9-9-224 (Michie 1991); NEB. REV. STAT. §§ 43-104.02 to .04 (1988); N.Y. SOC. SERV. LAW § 372-c (McKinney 1992); OR. REV. STAT. §§ 109.096 (1990).

172. NEB. REV. STAT. §§ 43-104.02 to .04 (1988); see Wilson, *supra* note 88, at 409.

173. NEB. REV. STAT. § 43.104.02 (1988); Wilson, *supra* note 88, at 409-10.

174. N.Y. SOC. SERV. LAW § 372-c (McKinney 1992).

175. See *Lehr v. Robertson*, 463 U.S. 248, 250-51 (1983); see N.Y. DOM. REL. LAW § 111-a.2(b) (McKinney 1988).

176. See *Lehr*, 463 U.S. at 251; N.Y. DOM. REL. LAW § 111-a.2(b) (McKinney 1988).

177. *Lehr*, 463 U.S. at 251. New York Domestic Relations Law requires:

In addition to the persons whose names are listed on the putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock—those who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been

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statutes have been strictly construed, usually to the detriment of the putative father.

*In re Reeves*¹⁷⁸ concerns a putative father who filed a petition to set aside a finalized adoption.¹⁷⁹ He alleged that "he was the father of [the child] . . . he had significant contacts with [the child] since birth, and . . . he had not received notice of the adoption proceedings."¹⁸⁰ The Arkansas Supreme Court held that because the father failed to file with the putative father registry, he was not entitled to notice of the adoption proceeding.¹⁸¹

Arkansas law allows any potential putative father the right to file with the state's registry.¹⁸² "Upon filing, the father is entitled to a copy of any adoption petition filed naming or involving his [alleged] child."¹⁸³ Thus, because Arkansas law would have entitled the father to notice if he had registered, the adoption could not be overturned.¹⁸⁴ Additionally, the mother lied about the existence of the biological father in the adoption petition.¹⁸⁵ The court stated that while it did not condone the mother's actions, "sanctions are available when a party or witness offers perjured testimony."¹⁸⁶

Thus, a putative father registry proves to be an effective means of facilitating early adoption; the system assures prospective adoptive parents that their adoption can become final without interruption from an unknown father who asserts his rights at the last minute. Additionally, the registries help achieve the goal of promoting the best interests of the child in the adoption process by ensuring the provision of a stable home environment at the earliest opportunity. However, many putative fathers have challenged the registry schemes as unconstitutional.

identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.

Id.; see N.Y. DOM. REL. LAW § 111-a (McKinney 1988).

178. 831 S.W.2d 607 (Ark. 1992).

179. *Id.*

180. *Id.*

181. *Id.* at 610.

182. *Id.* at 609.

183. *Id.*; see ARK. CODE ANN. § 9-9-224(a) (Michie 1991).

184. *Reeves*, 831 S.W.2d at 609.

185. *Id.* at 607.

186. *Id.* at 610.

B. The Constitutionality of Putative Father Registries

In *Robert O. v. Russell K.*,¹⁸⁷ an unwed father sought to vacate the order approving his son's adoption.¹⁸⁸ The putative father and mother had a brief engagement that they eventually ended.¹⁸⁹ However, unbeknownst to the putative father, his former fiancée was pregnant.¹⁹⁰ After the birth, the mother placed the child for adoption.¹⁹¹ During the months of the pregnancy, the father made no effort to contact his ex-fiancée.¹⁹² However, the couple later reconciled and when the father learned about the adoption, he filed with the New York Putative Father Registry and commenced a proceeding to vacate the finalized adoption.¹⁹³ The law provided several ways for the father of a child born out of wedlock to qualify for notice of an adoption proceeding.¹⁹⁴ The father argued that because New York laws did not require notice and consent from a biological father in his position, New York effectively deprived him of a constitutional liberty interest.¹⁹⁵

The court recognized that an unwed father of an infant who is immediately placed for adoption at birth is in a unique situation because his opportunity to establish a relationship with his child can quickly disappear.¹⁹⁶ The court noted that in the past it had "acknowledged that in some instances the [United States] Constitution protects an unwed father's opportunity to develop a relationship with his [child]."¹⁹⁷ However, this opportunity interest does not arise from the

187. 604 N.E.2d 99 (N.Y. 1992).

188. *Id.* at 100.

189. *Id.*

190. *Id.*

191. *Id.* at 100-01.

192. *Id.* at 101.

193. *Id.*

194. *Id.*; see N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1988). The court noted that under New York law an unwed father may qualify "by having been adjudicated to be the father, by filing a timely notice of intent to claim paternity, by living openly with the mother and child and holding himself out as the father, by having been named the father in a sworn statement by the mother, by having married the mother subsequent to the birth, or by filing with the Putative Father Registry." *Robert O.*, 604 N.E.2d at 101 (citing N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1988)).

195. *Robert O.*, 604 N.E.2d at 101.

196. *Id.* at 102.

197. *Id.*

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mere fact of a biological tie.¹⁹⁸ Rather, “[t]he right exists only for the unwed father who manifests his willingness to assume full custody of the child and does so promptly.”¹⁹⁹

The father argued that the opportunity interest should be extended to him because he was totally unaware of the child’s existence.²⁰⁰ The father analogized his case to an earlier case decided by the New York Court of Appeals, *In re Raquel Marie*.²⁰¹ In that case, the court held that:

[A] father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under-six-month-old child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship.²⁰²

The court in *Robert O.* noted that an unwed father who has promptly done all that he could to protect his parental interest is entitled to constitutional protection, but this father did not fit that category.²⁰³ The court further explained that the timing of the father’s actions is the “‘most significant’” element.²⁰⁴ The court, after noting that, “[p]romptness is measured in terms of the baby’s life [and] not by the onset of the father’s awareness[,]” concluded that this father did not act promptly because he had not come forward until nearly a year and a half after the baby went to live with the adoptive

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*; see 559 N.E.2d 418 (N.Y. 1990).

202. *Marie*, 559 N.E.2d at 425.

203. *Robert O.*, 604 N.E.2d at 103.

204. *Id.* The court explained:

States have a legitimate concern for prompt and certain adoption procedures and their determination of the rights of unwed fathers need not be blind to the “vital importance” of creating adoption procedures possessed of “promptness and finality,” promoting the best interests of the child, and protecting the rights of interested third parties like adoptive parents. Recognizing those competing interests—all of which are jeopardized when an unwed father is allowed to belatedly assert his rights—we stressed in *Raquel Marie* that the period in which the biological father must manifest his parental interest is limited in duration: if the father’s actions are untimely, the State can deny a right of consent.

Id. (citations omitted).

parents.²⁰⁵ The court noted that no one prevented the father from finding out about his ex-fiancee's pregnancy; "[h]is inaction . . . was solely attributable to him."²⁰⁶ The court also denied the father's equal protection claim, holding that the father did not meet the burden of showing a lack of rationality in the New York laws.²⁰⁷

In a concurring opinion, Judge Titone disagreed with the majority's reliance on the fault of the biological father in failing to discover the pregnancy or birth of the child until after it was adopted.²⁰⁸ Judge Titone's view was as follows:

the adoption should be left undisturbed despite [the father's] competing interest in the child not because [the father] is blameworthy, but rather because the strong public policies favoring the finality of adoptions outweigh the interest of a biological father who, through no fault of his own, has been deprived of the opportunity to "manifest and establish his parental responsibility" toward the child.²⁰⁹

Moreover, Judge Titone believed that the majority opinion placed an "unrealistic burden" on men who, "in this age of sexual permissiveness, have intimate relations with women to whom they are not married."²¹⁰

205. *Id.* at 103-04.

206. *Id.* at 104.

207. *Id.* at 105.

208. *Id.* (Titone, J., concurring).

209. *Id.*

210. *Id.* at 106. Judge Titone noted further that:

Because of the biological characteristics of the parties to these relationships, it is the women, rather than the men, who are in the unique position to discover whether a pregnancy has resulted. Further, in most instances, it is the women, rather than the men, who hold the exclusive power to decide whether or not the other progenitor is to be informed of the pregnancy's existence.

. . . .

I would submit, most respectfully, that a rule which places the onus on the man to investigate whether a woman with whom he is no longer intimate has become pregnant is simply out of step with modern mores and the realities of contemporary heterosexual liaisons. In this age of readily accessible birth control devices, men have greatly diminished reason, in most circumstances, to suspect that a woman with whom they have been intimate has become pregnant. Accordingly, there is little to prompt them to pursue their former lovers to satisfy themselves on that point.

Id.

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Judge Titone ranked the best interests of the child as the most important concern throughout the whole adoption process.²¹¹ He remarked that both the New York legislature and the courts have placed central importance on the finality of the adoption process.²¹² He noted the importance of the finality in the lives of the children as follows:

One of the most crucial elements of a healthy childhood is the availability of a stable home in which each family member has a secure and definite place. In addition to the stake of the adopted child, the adoptive family is unquestionably adversely affected by any lingering uncertainty about the permanence of the adoption. As one commentator has observed, "[t]he bond, the love, the intense emotion between the adoptive parents and the child placed in their home, is created the very moment their dream is fulfilled and a child comes through their door."²¹³

Judge Titone viewed the due process inquiry as a balancing test of the biological parents' interests against " '[t]he legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously.' "²¹⁴ He then explained that the state's interest in finality outweighs whatever interest the father might have.²¹⁵

In *Shoecraft v. Catholic Social Services Bureau*,²¹⁶ a putative father challenged the constitutionality of Nebraska's law requiring a putative father to file notice of intent to claim paternity.²¹⁷ The statute entitles an unwed mother to automatic custody of her child, while an unwed father is not afforded the same right.²¹⁸ The court upheld the statute after identifying several compelling state interests as the basis for its decision.²¹⁹ First, the five-day period is typically the

211. *See id.* at 105-08.

212. *Id.* at 106.

213. *Id.* at 106-07.

214. *Id.* at 107 (quoting *Lehr v. Robertson*, 463 U.S. 248, 265 (1983)).

215. *Id.* at 108.

216. 385 N.W.2d 448 (Neb. 1986).

217. *Id.* at 450.

218. *Id.* at 451-52; *see* NEB. REV. STAT. § 43-104.02 (1988).

219. *Shoecraft*, 385 N.W.2d at 451-52. The court noted that:

length of time that a mother spends in the hospital following birth.²²⁰ The five days gives the mother an opportunity to see whether the child's father will come forward and take responsibility.²²¹ If the mother realizes that the father is not going to come forward, she may consent to adoption before becoming too attached to the child.²²²

The court further found an interest in the child's prompt placement after birth.²²³ Finally, the court found that a speedy termination of the putative father's rights is in the best interests of the child, the biological mother, and the prospective adoptive parents.²²⁴ Absent such a policy, the fears of prospective adoptive parents could cause adoption to suffer a decline.²²⁵

However, one year later in *In re S.R.S.*,²²⁶ the Nebraska Supreme Court held that the Nebraska law requiring a putative father to file notice of intent to claim paternity within five days after the birth was unconstitutional as

[T]he state has a compelling interest in the well-being of all children, whether born in or out of wedlock, and of their proper nurture and care Further, that the transfer of children by relinquishment from unwed mothers and the adoption of those children are also compelling state interests is clear.

Id. at 451.

220. *Id.* at 452.

221. *Id.*

222. *Id.*

223. *Id.* The court noted that:

[T]he placement of the child in a home with persons anxious to have, love, and rear the child is to be preferred over a battleground where the mother must either depend on social agency support or on the outcome of a judicial support proceeding to compel the father to assume his responsibility.

Id.

224. *Id.*

225. *See id.* However, the dissent by Chief Justice Krivosha strongly disagreed with the majority opinion:

While it is true that in the instant case the statute does not automatically deny the father the right to notice and hearing, nevertheless it does seek to accomplish a similar end. The statute requires that the father must, within 5 days after birth, acknowledge paternity in a narrow, limited manner, to wit, by filling out a form provided by the Department of Social Services. The father must also file the form with the Department of Social Services. In my view this statutory scheme unconstitutionally discriminates against the father.

Id. at 454 (Krivosha, J., dissenting).

226. 408 N.W.2d 272 (Neb. 1987).

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applied to this father.²²⁷ The court applied strict scrutiny since a fundamental right, the relationship between a parent and a child, was involved.²²⁸ The court noted that “[t]he father in *Shoecraft* was aware of the impending adoption for 3½ to 4 months prior to the birth. Until 9 days after the birth the father never exhibited any responsibility for the mother or child.”²²⁹

In this case, the father had established a familial bond with the child. He lived with the child, provided for the child, and was involved in the child’s care.²³⁰ Thus, the court held that “[w]e observe no compelling interest that the State secures by allowing a 2-year relationship to be severed for failure to file within 5 days of birth that justifies the disparate treatment of the [father] from those similarly situated on the grounds of gender and marital status.”²³¹

In *Swayne v. L.D.S. Social Services*,²³² the putative father launched an equal protection claim against a Utah statute that terminates the parental rights of the father of an illegitimate child if the father fails to file a timely notice of paternity.²³³ The father claimed that the statute unlawfully discriminated on the basis of gender because consent of the mother of an illegitimate child is required by statute before an adoption can occur, but the father must acknowledge paternity with the Utah Department of Health before his consent is required.²³⁴ The court applied a mere rationality standard, and the statute survived that level of scrutiny.²³⁵

The court explained that a reasonable basis for the different classification of unwed mothers and unwed fathers is that the mother’s identity is readily ascertainable, but the father’s paternity is not.²³⁶ Consequently, a reasonable basis for the differential treatment of filing and nonfiling fathers is “the state’s need to distinguish those fathers who have accepted

227. *Id.* at 279; see NEB. REV. STAT. § 43-104.02 (1988).

228. *In re S.R.S.*, 408 N.W.2d at 277.

229. *Id.* at 278.

230. *Id.* at 277.

231. *Id.* at 278-79.

232. 795 P.2d 637 (Utah 1990).

233. *Id.* at 640 (the Utah Statute was repealed in 1990).

234. *Id.*

235. See *id.* at 640-41.

236. *Id.* at 641.

legal responsibility for the care of their children from those fathers who have not.²³⁷

In a concurring and dissenting opinion, Justice Zimmerman maintained that the court should have applied strict scrutiny because a fundamental right is involved: the right of a father to develop a relationship with his child.²³⁸ Justice Zimmerman then argued that the registry statute could not survive strict scrutiny.²³⁹ He noted:

The state may have a legitimate interest in easing the way for the adoption of illegitimate children and in speedily resolving questions about the identity of the fathers, but that objective does not require or justify the indiscriminating, across-the-board, gender-based distinction upon which the statute relies.²⁴⁰

Thus, putative father registries have, for the most part, survived constitutional challenge. Although the lack of uniformity in the various courts as to what level of scrutiny to apply provides no indication whether a registry statute would survive a constitutional attack in Georgia, the competing interests involved are clear—the putative father's interest in establishing a relationship with his child, the adoptive family's interest in maintaining the familial bond with the child, and most importantly, the child's interest in a stable, loving, and uninterrupted family life. The putative father registries provide a mechanism to achieve the latter two of these interests, sometimes at the expense of the first.

Furthermore, the development of a putative father's rights over the past ten years indicates that a mere rationality test would be appropriate. The Supreme Court has clearly established that there are two classes of putative fathers—those who manifest a desire to establish a relationship with their child and those who do not.²⁴¹ Thus, a mere rationality test is appropriate in cases involving a constitutional attack by the latter category of fathers, while strict scrutiny would be appropriate in attacks by the former category.

237. *Id.*

238. *Id.* at 646 (Zimmerman, J., concurring and dissenting).

239. *Id.*

240. *Id.* at 646-47.

241. See generally Buchanan, *supra* note 59.

C. Should Georgia Establish a Putative Father Registry?

The Georgia General Assembly should revise the portions of the adoption statutes dealing with biological fathers who are not legal fathers. Specifically, the General Assembly should establish a putative father registry that would provide for a class of fathers who would automatically be entitled to notice of adoption proceedings. For example, the General Assembly could replace Code section 19-8-12 as follows:

Relinquishment or consent for the purpose of adoption given only by a mother of a child born out of wedlock pursuant to sections 19-8-5, 19-8-6, and 19-8-7 shall be sufficient to place the child for adoption and the rights of any alleged father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with [insert appropriate governmental agency here], within five days after the birth of the child, a notice of intent to claim paternity.

The General Assembly recognizes a strong interest in the prompt placement of children soon after birth to ensure the protection of the child's best interests. Thus, any father who fails to register his notice of claim to paternity shall be barred from thereafter bringing or maintaining any action to establish his paternity of the child. This failure shall further constitute an abandonment of the child and a waiver and surrender of any right to notice of or to a hearing in any judicial proceeding for the adoption of the child, and the consent of the father to the adoption of the child shall not be required.²⁴²

In addition to the above, more notice should be required for certain other classes of unwed fathers who, for example, have been named on the child's birth certificate, have been acknowledged in a sworn statement by the mother as the child's father, openly live with the child and the mother and hold themselves out as the child's father, or have been adjudicated by a court as the child's father.²⁴³ This additional category of unwed fathers entitled to notice will limit the number of constitutional challenges to a registry law

242. This model legislation borrows heavily from NEB. REV. STAT. § 43-104.02 (1988) and UTAH CODE ANN. § 78-30-4.8(3) (Supp. 1994).

243. See N.Y. DOM. REL. LAW § 111-a (McKinney 1988).

because only fathers who have done nothing to establish a relationship with their child are unprotected by the law.

Georgia has a strong interest in the ready identification of fathers who will come forward and assume parental responsibility for their children. Additionally, the state has a strong interest in the early placement of children into a home in which parental bonding will be uninterrupted. A putative father registry will help to achieve these interests. Under Georgia's current adoption laws, a putative father has at most sixty days to come forward and assert his parental rights.²⁴⁴ Code section 19-8-18 further provides that the biological father has up to six months following the issuance of an adoption decree in which to launch a judicial challenge.²⁴⁵ During this period the fate of the adopted child is at risk. A putative father registry will greatly reduce the period of limbo and will ensure the speedy placement of children into a stable environment.

Inevitably, some situations might arise in which it is unfair to the putative father to automatically terminate his rights because he did not file with the registry. However, these instances could be handled on a case-by-case basis. In the Baby Jessica scenario, Daniel Schmidt was allegedly unaware of Cara Clausen's pregnancy. Therefore, had a registry system been in place in Iowa, Schmidt would not have known that he needed to protect his rights by registering. The majority opinion in the Iowa Supreme Court case discussed the DeBoer's argument that Daniel Schmidt had abandoned his rights by failing to protect them when Clausen first learned that she was pregnant.²⁴⁶

[I]t is suggested that this father should have acted to protect his parental rights immediately when the pregnancy became known, even though he had no indication from [Cara] that he was the father and even though she was dating another man at the time. This, of course, is totally unrealistic; it would require a potential father to become involved in the pregnancy on the mere

244. See O.C.G.A. § 19-8-12(b)-(d) (1991); see also *supra* notes 122-34 and accompanying text.

245. 1995 Ga. Laws 791. This amendment forecloses any judicial challenge to a final adoption decree more than six months after such decree is entered. *Id.*

246. *In re B.G.C.*, 496 N.W.2d 239, 241, 246 (Iowa 1992).

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speculation that he might be the father because he was one of the men having sexual relations with her at the time in question.²⁴⁷

While the majority treats such a responsibility on the part of the putative father as "unrealistic," it is exactly what the registries require. The registry system places the burden on the man to investigate whether he has fathered a child, and to accept or reject responsibility.

In the Baby Jessica case, Dan Schmidt knew that Cara Clausen was pregnant as early as December of 1990.²⁴⁸ Indeed, Clausen and Schmidt worked in the same building and for the same employer.²⁴⁹ The couple ended their sexual relationship within one month of the child's conception.²⁵⁰ Thus, Schmidt could have easily reached the conclusion that he was the baby's father. Dan Schmidt only had to ask Cara Clausen a simple question: Was it possible that he was the child's father? As Justice Snell stated in his dissent to the Iowa Supreme Court's decision:

Having knowledge of the facts that support the likelihood that he was the biological father, nevertheless, he did nothing to protect his rights.

Daniel's sudden desire to assume parental responsibilities is a late claim to assumed rights that he forfeited by his indifferent conduct to the fate of Cara and her child.²⁵¹

In the aftermath of the Baby Jessica case, prospective adoptive parents face the real possibility that the biological father of the child they adopt will show up before the adoption becomes final, but after a familial bond has formed. This may lead couples to think twice before choosing adoption, and couples may decide to pursue other avenues to start their family, such as surrogacy. By establishing a putative father registry, prospective adoptive parents could take comfort in the fact that the biological father's name did not appear in the registry and that the court had effectively terminated his

247. *Id.* at 241 n.1.

248. *Id.* at 247 (Snell, J., dissenting).

249. *Id.*

250. *DeBoer v. Schmidt*, 502 N.W.2d 649, 687-88 (Mich. 1993) (Levin, J., dissenting).

251. *In re B.G.C.*, 496 N.W.2d at 247 (Snell, J., dissenting).

rights. More importantly, the registry will ensure that children will be allowed to remain in a stable and continuous home environment, free from the risk of a sudden disruption that would forever haunt their lives.

D. In the Best Interests of the Child

The Georgia General Assembly amended Code section 19-8-18 to provide a six month "statute of limitations" beyond which no judicial challenge to the adoption will be allowed.²⁵² As noted earlier, this Act elevates the child's best interests in the adoption process;²⁵³ however, the Act still leaves the adoptive family in a state of limbo for six months following entry of a final adoption decree.

Authors Goldstein, Freud, and Solnit, authorities in both law and psychology, take the position that the law must make the child's needs the paramount concern in adoption decisions.²⁵⁴ The authors opine that the person who fills a child's needs for "physical care, nourishment, comfort, affection, and stimulation" becomes that child's "psychological parent."²⁵⁵ The authors suggest that physical and emotional attachments grow from the day-to-day attention to the child's needs; therefore, child placement decisions should protect the child's need for "continuity of relationships" and should be final.²⁵⁶

In the Baby Jessica case, the DeBoers were granted temporary custody of Jessica pending the final adoption order.²⁵⁷ Courts very often grant temporary custody to prospective adoptive parents prior to the final adoption decree because it allows the early development of the parent-child relationship that is so important to the emotional growth of the child.²⁵⁸ The early placement of the child permits the

252. 1995 Ga. Laws 791.

253. See *supra* notes 135-38 and accompanying text.

254. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 22 (1973).

255. *Id.* at 17.

256. *Id.* at 31-32.

257. *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992).

258. See, e.g., *San Diego County Dep't of Soc. Servs. v. Edward M. (In re Baby Girl M.)*, 688 P.2d 918, 925 n.12 (Cal. 1984) (child placed with prospective adoptive parents pending the resolution of a putative father's rights); *In re Baby Girl Eason*, 358 S.E.2d 459, 460 (Ga. 1987) (child placed with adoption agency three days

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adoptive parents to begin caring for the child immediately, thereby facilitating the growth of physical, emotional, and psychological bonds.²⁵⁹ As mentioned earlier, a putative father registry will ensure that the bonds of love that develop through the early placement of the child into the adoptive parents' home will never be severed. In the absence of a putative father registry, the Georgia General Assembly should adopt an additional method for the termination of parental rights when such termination is in the best interests of the child.

In *Bennett v. Jeffreys*,²⁶⁰ a biological mother sought custody of her eight-year-old daughter who had been entrusted to the care of a family friend since birth.²⁶¹ The mother was fifteen and unwed when she gave birth and relinquished custody to the older woman.²⁶² *Bennett* did not involve an adoption like Baby Jessica's case. Rather, the mother, who was twenty-three at the time of the trial, was simply attempting to regain custody of her daughter.²⁶³ No statute was implicated because this was an unsupervised private placement. However, the court made valuable observations that are applicable to custody disputes between prospective adoptive parents and a putative father.

The court noted that a "State may not deprive a parent of the custody of a child absent . . . extraordinary circumstances."²⁶⁴ Further, "[t]he parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent."²⁶⁵ The court observed that there are exceptions to the rule, for example, "surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time."²⁶⁶ If the court

following birth and then with adoptive parents a short time thereafter); see also Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 973 (1992) (suggesting that unwed father be awarded *pendente lite* custody of his child surrendered for adoption).

259. See generally GOLDSTEIN ET AL., *supra* note 254.

260. 356 N.E.2d 277 (N.Y. 1976).

261. *Id.* at 280.

262. *Id.*

263. *Id.* at 280-81.

264. *Id.* at 280.

265. *Id.* at 281.

266. *Id.*

finds an exception to the rule, it will make the child's best interests the paramount concern.²⁶⁷ The court will not, however, terminate a parent's rights merely because someone else might do a better job of raising the child.²⁶⁸

However, the court stated that "the child may be so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child."²⁶⁹ The court concluded that cases involving custody disputes must be carefully decided in order to avoid providing an incentive for parents to "take the law into their own hands."²⁷⁰

*Fisher v. Barker Foundation (In re P.G.)*²⁷¹ involved an unwed father who sought to block the adoption of his son by another family.²⁷² The father argued that the statute involved violated substantive due process by "permitting the termination of parental rights (through adoption) over the objection of a natural parent, without a finding that the natural parent is unfit to raise the child."²⁷³ The father lived with the child's mother for a two-year period, but the couple never married.²⁷⁴ During the mother's pregnancy, the couple was no longer together.²⁷⁵ The mother decided to place the child for adoption, and at the age of five weeks, the child began living with an adoptive family.²⁷⁶ When the child was eighteen months old, the court granted the adoption petition because it was in the best interests of the child.²⁷⁷

267. *Id.*

268. *Id.* at 282. For example, the majority stated:

The child's "best interest" is not controlled by whether the natural parent or the nonparent would make a "better" parent, or by whether the parent or the nonparent would afford the child a "better" background or superior creature comforts. Nor is the child's best interest controlled alone by comparing the depth of love and affection between the child and those who vie for its custody.

Id. at 283.

269. *Id.* at 284.

270. *Id.*

271. 452 A.2d 1183 (D.C. Cir. 1982).

272. *Id.*

273. *Id.*

274. *Id.* at 1184.

275. *Id.*

276. *Id.*

277. *Id.*

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The District of Columbia (D.C.) Code allows a court to grant an adoption despite the objection of a natural parent if the court determines that it is in the best interests of the child.²⁷⁸ The father argued that the statute violated due process because it did not require a finding of parental unfitness.²⁷⁹ The court simply reiterated that "the constitutional issue has already been resolved [I]t is constitutionally permissible to order adoption over the objection of a parent if that is the 'least detrimental available alternative,' without necessarily finding that the [parent] is 'unfit.'"²⁸⁰

However, in 1990, the D.C. Court of Appeals clarified the meaning of the D.C. Code section allowing the termination of a natural parent's rights when it is in the best interests of the child.²⁸¹ *In re Baby Boy C.* involved an unwed father who asserted his rights after the child's mother had relinquished her parental rights to strangers who had filed an adoption petition.²⁸² The court held that the statutory best interests of the child standard "incorporates . . . a preference for a fit unwed father who has grasped his opportunity interest, and that this preference can be overridden only by a showing by clear and convincing evidence that it is in the best interest[s] of the child to be placed with unrelated persons."²⁸³ The court stated that, following the United States Supreme Court decision in *Lehr v. Robertson*,²⁸⁴ it could not "constitutionally use the 'best interests' standard to terminate the parental rights of a 'fit' natural father who has timely and continually asserted his parental rights and, instead, grant an adoption in favor of strangers simply because they are 'fitter.'"²⁸⁵

However, the court noted that there could be a situation in which "clear and convincing evidence will show that an award of custody to a fit natural parent would be detrimental to the

278. *Id.*; see D.C. CODE ANN. § 16-304(e) (1989).

279. *Fisher*, 452 A.2d at 1184.

280. *Id.* (citation omitted).

281. *In re H.R. (In re Baby Boy C.)*, 581 A.2d 1141 (D.C. 1990).

282. *Id.* at 1143.

283. *Id.*

284. 463 U.S. 248 (1983).

285. *In re Baby Boy C.*, 581 A.2d at 1178.

best interests of the child."²⁸⁶ The court declined to define the realm of possible situations, but instead stated that "presumptive custody for a 'fit' parent subject to rebuttal in the child's best interests is not constitutionally precluded"²⁸⁷ The court did provide an example from a California decision that terminated the parental rights of a fit unwed father because of the potential psychological harm to the child if she were to be taken from her prospective adoptive parents whom she had lived with for five years.²⁸⁸

The Georgia General Assembly should provide that parental rights may be terminated in the adoption context when a court finds that such a termination is in the best interests of the child.²⁸⁹ In light of the approach outlined in *In re Baby Boy C.*, the Georgia statute should provide a presumption of custody in a fit natural father who has exercised his opportunity interest. Such a provision may enable the statute to survive a constitutional attack because it would be consistent with the Supreme Court's decision in *Lehr*.²⁹⁰ Additionally, the Georgia statute should provide that the termination of a fit natural father's rights may still occur when the prospective adoptive parents can show by clear and convincing evidence that awarding custody to the natural father would be detrimental to the child. In other words, the presumption in favor of a fit natural father would be rebuttable. If such a statute were in place in Georgia, courts would have leeway to consider the child's best interests even in the face of a fit natural father's constitutional right to establish a relationship with his child.

In establishing clear and convincing evidence of detriment, some relevant considerations include:

286. *Id.*

287. *Id.*

288. *Id.* (citing *San Diego v. Edward M. (In re Baby Girl M.)*, 236 Cal. Rptr. 660 (Dist. Ct. App. 1987)).

289. Some courts consider a child's needs to be the paramount concern in a custody dispute between the biological and adoptive parents. See Gibbs, *supra* note 1 (quoting Dana Wakefield, Denver juvenile court judge: "In my courtroom, [the children] stay where they've been nurtured You have to consider who the child feels is the psychological parent. If they had a good bond in that home, I'm not about to break it.").

290. See *Lehr v. Robertson*, 463 U.S. 248 (1983).

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(1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development of the concept of time of children of different ages;

(2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;

. . . .

(4) to the extent feasible, the child's opinion of his or her own best interests in the matter.²⁹¹

The key focus should be on the child's emotional and psychological needs as opposed to who has a nicer home, a higher income, or a better education.

Under such a statute, the child's interest would be elevated to the paramount concern. Indeed, the evidence might show that the child's interests dictate a return to the natural father. However, the alternative possibility will at least be an available option, and the court will no longer be bound by the rigidities of the parental rights theory. While this statute would vest much discretion in judges and might also have the effect of further delay and expense in the adoption process, the ultimate end would ensure the protection of the child's best interests.

Applying these guidelines in Baby Jessica's case, Dan Schmidt clearly had every right to raise his child because the court found that he did not abandon Jessica, nor was he an unfit person for custody. However, extraordinary circumstances existed because the DeBoers retained custody of Jessica over an extended period of time, thus allowing emotional attachments to grow. The court essentially had two options: to deny the adoption and risk the emotional and psychological consequences to the child or to deprive the putative father of his parental rights. The Iowa courts were required to follow the former approach.²⁹² However, had the court decided that a best interest determination was the appropriate test, it would have provided an incentive for prospective adoptive

291. *In re L.W.*, 613 A.2d 350, 356 n.14 (D.C. Cir. 1992); see D.C. CODE ANN. § 16-2353(b) (1989 & Supp. 1994).

292. *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992).

parents in the same predicament as the DeBoers to hold on to the child as long as they can, knowing that no court would tear a child away from the only parents he or she has known.²⁹³ The "self-help" situation must be avoided, yet, at the same time, the child's emotional, psychological, and physical needs must be the primary concern. At times it may be appropriate to sidestep a biological parent's constitutional rights in exceptional circumstances when it means that the child might be better off. In the words of Chief Judge Charles D. Breitell of the New York Court of Appeals:

The day is long past . . . when the right of a parent to the custody of his or her child . . . would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. . . . [A] child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude²⁹⁴

CONCLUSION

The Iowa and Michigan court decisions to return custody of Baby Jessica to her biological parents after physical and emotional ties had developed between her and the DeBoers provoked debate over the importance of blood ties versus emotional bonds. The constitutional rights that putative fathers are afforded must not be infringed upon, yet at the same time, the child's rights and interests must be the paramount concern in adoption proceedings. The Georgia General Assembly has the opportunity to prevent this

293. See *In re Doe*, 638 N.E.2d 181, 182-83 (Ill. 1994) (holding that a best interests of the child determination was not appropriate in a custody dispute between adoptive parents and a putative father because the putative father's rights were never terminated). In an opinion written in support of the Illinois Supreme Court's denial of rehearing, Justice Heiple wrote:

If . . . the best interests of the child is to be the determining factor in child custody cases, persons seeking babies to adopt might profitably frequent grocery stores and snatch babies from carts when the parent is looking the other way. Then, if custody proceedings can be delayed long enough, they can assert that they have a nicer home, a superior education, a better job or whatever, and that the best interests of the child are with the baby snatchers.

Id. at 188 (citation omitted).

294. *DeBoer v. Schmidt*, 502 N.W.2d 649, 669 (Mich. 1993) (Levin, J., dissenting) (emphasis omitted) (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277, 281 (N.Y. 1976)).

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nightmare from happening in Georgia by implementing a comprehensive reform of its adoption statutes. The General Assembly faces the difficult task of providing for the many contingencies that may occur before an adoption becomes finalized, in particular, what to do when the birth mother lies about the identity of the biological father.

Specifically, Georgia should establish a putative father registry that will provide for the automatic termination of a putative father's rights if he fails to register within a given time period. Additionally, the statute should allow certain other putative fathers to receive notice of the adoption if they fit a given category of fathers who have demonstrated an assumption of responsibility.

An additional method of ensuring the protection of the child's interests is to allow the termination of parental rights when the court finds that it is in the best interests of the child to do so. Under this method, a fit biological father will be entitled to custody of the child in the event of a dispute between the biological father and the prospective adoptive parents. However, if the prospective adoptive parents can establish that the award of custody to the natural father would be detrimental to the child, they would be entitled to custody.

Adoption is a creature of statute, and we must therefore look to our legislature to cure any evils that arise as a result of poorly drafted statutes. In the aftermath of the Baby Jessica case, the necessity for wide-ranging reform in the way children are treated within the legal system is clear. The Georgia General Assembly must act now to ensure that the tragedy that touched the lives of the DeBoers, the Schmidts, and Baby Jessica need never be repeated.

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